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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 907

ORLEANS PARISH SCHOOL BOARD,
Petitioner,

versus

RELIANCE INSURANCE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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ORLEANS PARISH SCHOOL BOARD,

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versus

RELIANCE INSURANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on September 19, 1963, rehearing of which was denied on December 12, 1963.

A.

CITATION TO OPINIONS BELOW

The district court issued two opinions herein, each dealing with separate phases of the instant litigation, and said opinions are reported at 192 F. Supp. 524, and 201 F. Supp. 78, and are printed in the Appendix hereto, at pages 23 and 31.

The opinion of the United States Court of Appeals for the Fifth Circuit, affirming in part, and reversing in part, the district court's holdings is reported at 322 F. (2d) 803, and is printed in the Appendix hereto at page 37.

The order of the United States Court of Appeals for the Fifth Circuit, denying petitioner's Petition for Rehearing, is not reported but is printed in the Appendix hereto at page 53. (No opinion was rendered in connection therewith).

B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1963. Application for Rehearing was denied on December 12, 1963 (App. p. 53). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1) and 28 U.S.C. § 2101(c).

C.

QUESTIONS PRESENTED

1. Is replacement cost, or replacement-cost-minus-depreciation, the measure of an assured's recovery for a partial fire loss to immovable property, under a statute which stipulates that "in case of partial damage," the insurer shall pay "such amount * * * as will permit the insured to restore the damaged property to its original condition."?[1]

2. Does the deposit, by an insurer, in the registry of court, of only a portion of the amount for which it is

[1] L.S.A.-R.S. 22:695B, printed in full in the Appendix at p. 55.

liable a policy of fire insurance, excuse it from the payment of statutory penalties and attorney's fees.[2]

D.

STATUTES INVOLVED

The statutes which this case involves are:

1. L.S.A. R.S. 22:695, which is printed in full in the Appendix at p. 55.

2. L.S.A. R.S. 22:658, the pertinent portions of which are set forth in footnote 2, *supra.*

E.

STATEMENT OF THE CASE

On March 27, 1958, the main building of the Landry High School, and its contents, were destroyed by fire.

The building, and its contents, were the property of the Orleans Parish School Board (hereinafter for brevity referred to as "School Board"), the Petitioner herein.

On the date of the loss, the School Board carried fire and explosion insurance, totaling FIFTY-SEVEN MILLION, SEVEN HUNDRED SIXTY THOUSAND, FOUR HUNDRED EIGHTEEN & 60/100 ($57,760,-418.60) DOLLARS (Stipulation of Facts-15, R. 17). The

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[2] L.S.A.-R.S. 22:658:

"* * * Failure to make such payments within sixty days after receipt of such proofs and demand therefor, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty * * * of 12% damages * * * together with all reasonable attorney's fees for the prosecution and collection of such loss * * * Provided, that all losses on policies covering automobiles, trucks, motor propelled vehicles *and other property against fire and theft, the amount of the penalty in each of the above cases shall be 25% and all reasonable attorney's fees.*" (emphasis ours).

said insurance was placed with four different companies, and was evidenced by four different insurance policies, as follows:

Name of Company	Policy No.
Reliance Insurance Company (Hereinafter for brevity referred to as Reliance) the Respondent herein	F-9623
New Zealand Insurance Company, Ltd.	22607
Niagara Fire Insurance Company	S-25091
North British & Mercantile Insurance Company, Ltd.	870626

(Stipulation of Facts-7; R. 15)

On the date of the fire, the face amount of the policy issued by Reliance was $28,880,209.29; and therefore, represented 50% of the total insurance in force on said date (Stipulation of Facts-15, R. 17).

The Niagara Fire Insurance Company, the New Zealand Insurance Company, Ltd., and the North British & Mercantile Insurance Company, Ltd., tendered to the School Board drafts totaling $135,193.00, reserving to the School Board the right to proceed against said companies for any additional sums claimed to be due to it under the policies issued by said companies. The School Board brought an action against the said three companies for the additional sums due to it by said companies (Civil Action 8828), and said action was consolidated with the instant suit. Prior to trial, however, this latter claim was settled; was continued indefinitely at the time of the trial of the instant case; and has since been dismissed.

The Respondent herein, Reliance, deposited in the registry of this Court, the sum of $135,193.00 on February 9, 1959, contending that said amount constituted the maximum amount due the School Board under the insurance policy issued to it by Reliance.

The School Board withdrew the aforesaid sum of $135,193.00, and filed a counter-claim for an additional sum of $115,052.50, together with penalties, interest, and attorney's fees.

Counsel for Petitioner and counsel for Respondent agreed upon a Stipulation of Facts (R. 14-23), which was filed in the record below.

The case was tried and decided in two phases. In the first phase, testimony was received relative to the three following stipulated issues:

"1. May the court refer to the document designated "Location of Schools and Statement of Values" (hereinafter called "document") constituting a part of the Bid Specifications issued by the School Board to the prospective bidders, in order to determine (a) the amount of insurance on the Landry School Building, and on its contents, and (b) whether or not there has been compliance with the co-insurance clause?

"2. (a) Is the amount of insurance on the building, and on the contents, equal to (i) 90% of the values ($302,192.00 for the building and $35,000.00 for its contents), shown on said document; or (ii) 100% of said values, or (iii) the aggregate face amount of the policies at the time of the fire ($57,760,418.60)?

(b) Under the provision in the policy for architects' fees, can such fees be recovered in excess of the amount of insurance?

(c) Is the amount of insurance on the building, and on the contents, increased by all or any portion of the valuation of $130,000.00 for the item designated in said document as "miscellaneous (including fences)"?

"3. Do the provisions of the Louisiana Valued Policy Law (RS 22:695) apply herein insofar as concerns the immovable property?"

In a written opinion filed on April 3, 1961, (R. 360-368) (App. p. 23) the District Court held that the policy in suit was a blanket policy, and the amount of coverage as to each piece of property was the total coverage of all of the property. (R. 365 & 366-7) The Court further held that the co-insurance clause in the policy would be satisfied as long as the total amount of coverage was 90% of the total value of all the property, and concluded by saying (R. 367):

> "Consequently, unless the insurer here can prove that the total amount of coverage as shown on the policy is less than 90 per cent of the total value of all the property of the Orleans Parish School Board, it will be required to pay the Board such amount as will permit the insured 'to restore the damaged (immovable) property to its original condition,' including architect's fees, in addition to an amount equal to the actual cash value of the movable property lost in the fire."

In the second phase of the case, the Court received testimony relative to the cost of restoring the Landry School to its original condition at the time of the fire, and received briefs and arguments relative to the proper method of determining the dollar amount of Appellee's loss.

In an opinion filed January 5, 1962, (R. 368-375) (App. p. 31) and in a judgment filed January 19, 1962, (R. 375 and 376), the District Court rendered a judgment in favor of the Orleans Parish School Board and against Reliance in the sum of $115,052.50, together with interest at the rate of 5% per annum from the 3rd day of March, 1959, until paid, and for all costs.

From this judgment, Reliance perfected an appeal. The District Court rejected the School Board's claim for

penalties and attorneys' fees and from this portion of the judgment, the School Board filed a Cross Appeal.

The Court of Appeals, in an opinion entered on September 19, 1963, (App. p. 37) affirmed the District Court's holding that the policy in suit was a blanket policy; that interest runs from the date of judicial demand and that Reliance's refusal to pay was not so lacking in cause as to justify imposition of statutory penalties. The Court of Appeals, however, reversed the holding of the District Court that depreciation need not be considered in determining the insurer's liability on the policy.

This petition for a Writ of Certiorari is filed for the primary purpose of asking this Court to review that portion of the opinion of the Court of Appeals, which fixed the liability of the insurer at replacement-cost-minus-depreciation, instead of at replacement cost, even though the pertinent Louisiana statute stipulates that in case of partial damage, the insurer shall pay "such amount * * * as will permit the insured to restore the damaged property to its original condition." L.S.A. R.S. 22:695(B)

A subordinate issue presented by this petition for a Writ of Certiorari is to seek a review by this Court of that portion of the judgment of the Court of Appeals, which refused to assess statutory penalties and attorney's fees, relying upon the trial judge's finding that the Company had evidenced good faith by depositing a substantial sum in the Court's registry.

The basis for Federal jurisdiction in the Court of first instance was diversity of citizenship in an action in which the amount in controversy exceeded $10,000.00.

F.

ARGUMENT

1. The opinion of the Court of Appeals for the Fifth Circuit decides an important State question in a way in conflict with applicable State Law. Furthermore, although the Louisiana Statute involved is *sui generis*, the Court of Appeals' decision is in conflict with the decisions of other Courts of Appeals interpreting similar statutes.

The basic error into which the Court of Appeals fell was in relying upon *obiter dicta* found in the syllabus by the Court in the case of *Stenzel v. Penn. Fire Insurance Co.*[3]

Even though the opinion in the *Stenzel* case was written in 1903, it was after the date of the passage of the first Louisiana Valued Policy Statute (La. Act. 135 of 1900), the case was decided solely upon the language contained in the policy, and was not decided under the statute. Therein, the policy provided that the loss or damage shall be ascertained according to the actual cash value of the property, with a proper deduction for depreciation. Understandably, therefore, the Court determined that the maximum liability of the insurer was the actual cash value of the property with proper deduction for depreciation. It is submitted that the *Stenzel* case did not even purport to interpret the language found in LSA-R.S. 22:695(B), which is the current Louisiana statute setting forth the insurer's liability in the event of a partial loss to immovable property and providing that in such a situation the insurer must pay such amount as will permit the insured to restore the damaged property to its original condition. The enactment of LSA-R.S. 22:695 was a deliberate enactment of the Legislature of Louisiana, intend-

[3] 110 La. 1019, 35 So. 271 (1903).

ing to establish the amount for which immovable property is insured as the maximum limit of recovery, **and also,** to establish replacement cost as the measure of recovery for partial fire losses sustained by immovable property in the State of Louisiana, with no deduction for depreciation. The opinion of the Court of Appeals fails to recognize this fact, and if allowed to stand will not permit an insured to recover such amount as will permit him to restore the damaged property to its original condition, as provided for in the statute, but rather will only allow an insured to recover such amount minus depreciation.

It is respectfully submitted that this portion of the Court's opinion reverses the established Louisiana law on the subject for more than half a century, and **is the only Louisiana case so holding** which counsel, after a diligent search, has been able to locate. Furthermore, the opinion is contrary to the general established practice of adjusting partial fire losses in the State of Louisiana; and, is contrary to the manner in which 32 prior fire losses sustained by **this insured** have been adjusted, by **this insurer,** under **this insurance policy.**

In a leading Louisiana case, the U. S. Court of Appeals for the Fifth Circuit recognized the efficacy of the indemnification theory. In *Lighting Fixture Supply Co. v. Fidelity Union Fire Ins. Co., the Court said:*

> "The policy was an open one. It is a fundamental principle that such a policy of insurance is a contract of personal indemnity. **The property is not insured against destruction, but the insured is guaranteed against loss,** to the extent of his insurable interest, not exceeding the amount stipulated." (Emphasis mine)[1]

[1] 55 F. (2d) 113, 113 (CCA-5th 1932), cert. den. U.S. Sup. Ct. (May 23, 1932).

In considering the general jurisprudence on the instant subject, great care must be taken to note the wording of the statute, or the policy provision, being interpreted by the Court.

With this caveat, let us now examine some of the cases decided outside of Louisiana.

Under the California Insurance Code, which is not as strong as LSA-R.S. 22:695, the United States Court of Appeals for the Ninth Circuit, refused to deduct depreciation from the replacement cost of a thirty year old structure, in *Continental Ins. Co. v. Dunne*,[5] saying:

> "Appellant contends that the court erred in failing to compute the damage to the one-story portion of the structure which was over 30 years old at its deteriorated value but instead computed the fire damage on the value of the new structure. We can find no error here, the California Insurance Code in its Section 2051 providing for the open policies here involved:
>
> "§ 2051. Measure of indemnity under open policy. Under an open policy, the measure of indemnity in fire insurance is the expense to the insured of replacing the thing lost or injured in its condition at the time of the injury, such expense being computed as of the time of the commencement of the fire."

The United States Court of Appeals for the Fifth Circuit, refused to limit indemnity to the market value of insured property in a case arising under the Florida valued policy statute.[6] This case did not involve the question of the proper measure of damages, but only a consideration of the maximum limits of recovery. There-

[5] 226 F. (2d) 471, 473 (CCA 9th 1955).

[6] *National Fire Ins. Co. v. Board of Public Instruction*, 239 F. (2d) 370 (CCA 5th 1957).

in, even though a School Board had entered into a firm agreement prior to the fire to sell a schoolhouse, for less than the face amount of its policy, the Court entered a judgment for the face amount of the policy.[7]

In a Kansas case,[8] the United States Court of Appeals for the Tenth Circuit, reached the same conclusion in a case where the plaintiff bought a house from a friend for only $600.00, planning to move it to a lot which he owned. He insured the property for $6,000.00, and when it was destroyed by fire his insurer tried to settle for $600.00, claiming this was its value. In awarding the plaintiff the face amount of the policy, the court said, at p. 101:

> "The purposes of a valued policy law, it should be remembered, are: (1) to prevent overinsurance by requiring prior evaluation; (2) to avoid litigation by prescribing definite standards of recovery in case of loss; (3) to prevent impairement of the general values of the commonwealth; (4) to preserve homes and insure their rebuilding when destroyed."

In still another case,[9] the United States Court of Appeals for the Fourth Circuit, adopted the principle, well-entrenched in Louisiana law,[10] even before the adoption of valued policy laws, of refusing to limit recovery to the physical damage done to a building by fire, where as a result of the fire municipal authorities condemn the structure and order it torn down.

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[7] A similar conclusion was reached in the Tenth Circuit in *National Fire Ins. Co. v. School Dist. No. 68*, 115 F. (2d) 232 (CCA 10th 1940).

[8] *Magrath v. Mechanics & Traders Ins. Co.*, 249 F. (2d) 89 (CCA 10th 1957).

[9] *Rutherford v. Royal Ins. Co.*, 12 F. (2d) 880 (CCA 4th 1926).

[10] *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563; 18 So. 472 (1895), and other cases.

In a United States District Court decision,[11] arising under a Wisconsin Statute,[12] the Court said, at p. 121:

> "Under ordinary circumstances, we believe that the proper measure of damages to be employed when an insured building has been partially destroyed is the cost of repairs thereto, not to exceed actual cash value of the **entire** building." (Emphasis by the Court)

Even under the Texas Standard Policy, which is practically verbatim with the Louisiana Standard Fire Policy, an insured is entitled to recover the full cost of repair, for a partial loss, without a deduction for depreciation.[13]

Evidence of the fact that the Louisiana courts have interpreted the phrase "such amount * * * as will permit the insured to restore the damaged property to its original condition," as meaning replacement cost, without a deduction for depreciation, is found in the unbroken line of cases, which have held that where municipal ordinances require a building damaged by fire to be replaced in accordance with current building requirements, the payment of an amount sufficient to rebuild the property as it stood prior to the fire does not satisfy the requirements of the valued policy law. In most of these cases, the additional amount required to replace the buildings in accordance with current building regulations made the replacement cost exceed the face value of the policy. If the measure of recovery under the Louisiana valued policy

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[11] *Wisconsin Screw Co. v. Fireman's Fund Ins. Co.*, 193 F. Supp. 96 (D.C. Wis. 1961).

[12] "* * * to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, * * *"

[13] *Gulf Ins. Co. v. Carroll*, 330 SW (2d) 227 (Texas Civ. App. 1959); *Third National Bank v. American Equitable Ins. Co. of N. Y.*, 178 SW (2d) 915 (1943); 14 S.W. L. J. 398, 400 (1960).

law was replacement-cost-minus-depreciation, these cases would have limited recovery to said amount. But instead, the courts have stated, in essence, that the insured is entitled to recover an amount sufficient to replace the building which was destroyed, even if it is necessary, in order to comply with municipal ordinances, to construct a more expensive kind of building than that which was destroyed!

In determining the indemnity theory of the Louisiana valued policy law, it is important to note that LSA-R.S. 22:691 not only limits recovery to the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, but adds "without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair." **THIS RESTRICTIVE LANGUAGE IS NOT CONTAINED IN SECTION 695(B).**

Thus, it is clear that Louisiana has adopted the indemnity theory of recovery which enables the insured to be made whole, rather than merely being compensated for the asset value of his loss. The property is not insured against destruction, but the insured is guaranteed against loss.

Additional evidence of the fact that all Louisiana courts, lawyers, and insurance companies are convinced that a different measure of damage is established in LSA-R.S. 22:695 than is established in the Standard Fire Policy (R.S. 22:691) is the large number of cases involving the question as to whether the property covered by the insurance is movable or immovable. If it was felt that the measure of recovery in either instance would be the same, there would be little reason for this class of litigation. But the fact of the matter is that, in Louisi-

ana, fire losses involving **movable property** are, and have been, adjusted under the provisions of the Standard Fire Policy by paying to the insured only the actual cash value of the property destroyed or damaged; i.e., replacement-cost-minus-depreciation. On the other hand, fire losses involving **immovable property** have always been adjusted in Louisiana by paying to the insured the amount necessary to repair the damage; i.e. replacement cost, with no deduction for depreciation.

It is apparent from the reported cases that the standard procedure in adjusting partial losses for fire damage to immovable property in Louisiana is for the insured and/or the insurance adjuster to obtain bids to determine the cost of repairing the damage, and the insurer has ever been ready to pay the amount of the low bid in adjusting the loss. This elementary proposition is not specifically discussed in the reported cases because it always has been assumed to be the law by both the insured and the insurer. In the litigated cases it appears that both parties begin with the basic assumption that the full cost of repairing the damage is the measure of recovery, and controversy arises only when extenuating circumstances lead the insured to believe he is entitled to more, or the insurer to believe that the extent of its liability is less.

For example, where there was a rise in the cost of materials between the time the estimates were obtained and the time the insurance company tendered payment;[14] or where additional damage was sustained by the building between the time the original estimate was obtained and the time the insurer tendered its check;[15] or, where the

[14] *Aycock v. Republic Ins. Co.*, 116 So. (2d) 317 (La. App. 1959); 74 ALR (2d) 1272.

[15] *Brocato v. Sun Underwriters Ins. Co.*, 219 La. 495, 53 So. (2d) 246 (1951).

insurance company claimed that the maximum extent of its liability was some sum less than the face amount of the policy, regardless of what method was used to measure the extent of the damage.[16]

That it has always been thought by Louisiana scholars that the state's valued policy law allowed recovery for the cost of repair with no deduction for depreciation, in the event of the partial destruction of immovables by fire, is evident in a comment by Hall T. Elder in *The Tulane Law Review*.[17] In discussing the effect of *Lighting Fixture Supply Co. v. Fidelity Union Fire Insurance Co.*,[18] the author succinctly explains Act 135 of 1900, by saying:

> "* * * Sec. 2 is a mere amplification of the first section; it provides that where the property is wholly destroyed that the full amount of the policy shall be paid **and that when it is partially destroyed that enough to repair it shall be paid.**" (Emphasis mine)

The record in the acse at bar[19] shows clearly and unequivocally that between the time the instant policy was issued in May of 1954 up to March 26, 1958, the School Board filed 32 individual claims **under the policies here in suit,** of which five were in excess of $10,000.00. In each instance, the Board's underwriters adjusted the losses by paying to the Board **the full amount necessary to repair the damage done by the fire, with no deduction for depreciation.** In each instance, the Board selected an architect satisfactory to its insurers, who prepared plans and specifications to repair the fire damage. These plans and specifications were placed on the open market and a

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[16] *Stenzel v. Pennsylvania Fire Ins. Co., supra*, fn. 3.

[17] 6 Tulane Law Rev. [illegible] 627 in fn. 3 (1932).

[18] *Supra*, fn. 4.

[19] Tr. pp. 186-194.

contract was awarded to the lowest responsible bidder. In each instance, the fire loss was adjusted, by the Board receiving from its insurers **the full amount which it had to pay to the contractor with no deduction for depreciation,** plus the amount of the architect's fees. Certainly, the contemporaneous construction placed upon the insurance contract by the insurers (including the respondent) and the insured, in the adjustment of 32 prior fire losses under the same policy, is proof of the intent of the parties in entering into the contract, even if it is assumed *arguendo*, that the words of the contract are doubtful.[20]

Furthermore, Mr. A. L. Schlesinger, Jr., a Charter Property and Casualty Underwriter (C.P.C.U.), the recipient of Bachelor of Arts and Masters of Business Administration Degrees (majoring in insurance actuarial science) from the University of Michigan, and a Professor of Property Insurance for the past 12 years at Tulane University, testified in the District Court that in actual practice in Louisiana, partial losses under the Louisiana valued policy law are adjusted on a replacement cost basis.[21]

Therefore, in addition to the fact that prior losses under the instant policy were adjusted on a replacement cost basis, with no deduction for depreciation, this method of measuring partial fire damage to immovable property is customarily used in Louisiana.

CONCLUSION

Without a valued policy statute in Louisiana, there would be no certainty in the adjustment of fire losses to immovable property. If an insured had a fire loss, be

[20] "When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation." La. Civ. Code, Art. 1956.

[21] Tr. pp. 164 and 165.

it total or partial, he could only recover the actual cash value of the property destroyed. In order to determine said actual cash value he and his insurer would have to consider, and argue about, the relative weight to be given a plethora of intangible values, such as, depreciation, functional obsolescence, market value, and the like. Under these circumstances, it would be safe to predict that an inordinately large percentage of fire losses would wind up being adjusted in court.

In order to do away with the uncertainty which would be the inevitable concommitant of such a system, Louisiana has successfully used its individualized valued policy statute, growing out of La. Act 135 of 1900 (now LSA-R.S. 22:695). Under this statute, an assured and his insurer, know precisely what is payable in the event of a fire loss. If a building is totally destroyed the insurer must pay the amount for which the property is insured. There can be no argument as to actual cash value, market value before and after the fire, value to the assured, objective value, depreciation, functional obsolescence, etc., etc. The amount of recovery is fixed and certain—liquidated damages agreed upon in advance, if you will.

Similarly, in the event of a partial loss, both parties know exactly what the assured is entitled to receive, and the amount the insurer must pay; namely, such amount as will permit the assured to restore the damaged property to its original condition. The adjustment of a fire loss is quick, certain and unmarred by argument or disagreement. An architect, acceptable to both parties, prepares plans and specifications, showing what must be done to repair the damage, reputable contractors submit bids thereon and the lowest responsible bid is selected. The insurer then pays the assured the amount of the low

bid, plus the architect's fee.—(provided said sum is not in excess of the amount for which the property is insured) and the matter is closed. The assured has received the indemnification he bought and paid for, and the insurer has discharged his contractual obligations.

If the opinion of the Court of Appeals is not changed, not only will there be uncertainty in the settlement of fire losses, but in addition thereto, inestimable financial loss will be inflicted upon all "insured" property owners in Louisiana whose property may be damaged by fire. Any "insured" property owner who may not have the cash resources to pay the difference between replacement cost and replacement-cost-minus-depreciation, will either lose his property, or be able to repair only a portion of the damage inflicted by the fire. And, if it happens that the property damaged by fire is subject to a mortgage, as is most immovable property, the owner is in an even more precarious position, for if he receives less than the amount necessary to repair his fire damage he will be completely dependent upon both the willingness and the ability of his mortgage creditor to increase his loan.

The principle adopted in the Court of Appeals' opinion will also have far reaching effects on every Homestead (or Building & Loan Association), on every Bank, and on every other lending agency in the State. If unchanged, no lending institution will be able to approve an application for a loan, unless it is prepared to set up a reserve, out of which an additional sum can be advanced to any borrower whose property is damaged by fire, so that the borrower will have the necessary funds to augment his "insurance" and repair the damage caused by a fire!

Certainly, partial loss should not be synonymous with partial recovery. If fire insurance is to fulfill its designed

purpose of indemnifying an assured against loss, an insurer should pay its assured, in case of partial damage, "such amount as will permit the insured to restore the damaged property to its original condition." The amount which will permit the insured to restore the damaged property to its original condition, is the cost of replacing or repairing the damaged property. As long as said amount is less than the amount for which the property is insured, **this is the amount which should be paid**—and it should not be reduced by depreciation, or by any other factor.

Nor should this basic principle be affected by the quantum of the loss, as suggested in the Court of Appeals' opinion. Such a rule of law would only compound uncertainty, for where shall the line be drawn? If one room is burned? Two rooms? Three rooms? Is the intrinsic value of any real property before a fire, actually increased by its damage by fire and the repair of the damage?

It is significant to note that the phrase "such amount as will permit the insured to restore the damaged property to its original condition" is not preceded by any limiting phrases, such as, "to the extent of"; or, "not exceeding"; or, "in no event greater than." Thus, the language of the statute clearly shows that it is intended to be **a substantive measure of recovery,** rather than a mere maximum limit of recovery.

In LSA-R.S. 22:695 (B) there is a period following the word "condition", and it is followed by no qualifying, modifying or restrictive phrase or clause. It is respectfully submitted, therefore, that the insurer in the case at Bar should pay to its assured such amount as will permit it to restore the damaged property to its original condition. Period.

Herein, the Orleans Parish School Board paid premiums on, and was insured against a loss by fire, up to a total of $57,760,418.60. A portion of the immovable property covered by the policy was damaged by fire, and it would cost $408,100 (including architect's fees) to restore the damaged property to its original condition, which is less than 1% of the amount for which the property was insured.

Its insurer should pay to it no less than $408,100 under:

a) the clear language of LSA-R.S. 22:695 (B);

b) the jurisprudence thereunder;

c) the accepted custom and practice of the trade;

d) the prior interpretation given **this** policy contract, by **this** insurer in adjusting prior losses of **this** insured; and

e) the rule of common sense.

It is respectfully submitted that the Court of Appeals was in error in reversing that portion of the District Court's opinion which awarded petitioner a judgment predicated upon a recovery of the full $408,100 of loss, and that a writ of certiorari should issue herein.

Respectfully submitted,

SAMUEL I. ROSENBERG,
747 National Bank of
Commerce Building,
New Orleans, Louisiana 70112,
JAckson 2-5128,
Attorney for Orleans Parish
School Board.

CERTIFICATE

I hereby certify that a copy of the foregoing petition was this day served on Deutsch, Kerrigan and Stiles, Attorneys of record, for Reliance Insurance Company, by delivering a copy to them at their office in the Hibernia Bank Building, New Orleans, Louisiana.

New Orleans, Louisiana , 1964.

SAMUEL I. ROSENBERG

APPENDIX 1

Opinion of Wright, District Judge, April 3, 1961

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS, DIVISION

No. 8742
CIVIL ACTION

RELIANCE INSURANCE COMPANY
Plaintiff

versus

ORLEANS PARISH SCHOOL BOARD
Defendant

ORLEANS PARISH SCHOOL BOARD
Plaintiff

versus

NIAGARA FIRE INSURANCE COMPANY ET AL.,
Defendant

Deutsch, Kerrigan & Stiles
Rene H. Himel, Jr.
Frank J. Peragine
Attorneys for Reliance Insurance Company

Polack & Rosenberg
Samuel I. Rosenberg
Attorneys for Orleans Parish School Board

WRIGHT, District Judge:

These consolidated actions concern the interpretation of a contract of insurance entered into between the Reliance Insurance Company and the Orleans Parish School Board. The primary question presented is whether the

policy in suit offers blanket fire coverage on all property owned by the School Board, each piece to the full amount of the policy, or whether the policy is a scheduled one with coverage limited to the stated value of each piece. In short, is this a blanket policy or a scheduled policy?

The parties are in agreement as to the differences between blanket and scheduled policies. Without conflict, the evidence shows that a blanket policy covers multiple pieces of property at an average rate each piece being insured up to the total amount of insurance on all property.[1] A scheduled policy, on the other hand, relates to specifically described individual pieces of property, insuring each in an amount specifically designated at a rate justified by the risk on that property.[2]

A blanket policy is usually issued on the basis of a statement of values listing property included in the coverage. This statement of values does not become a part of the policy, and may not be used as a coverage limitation in adjusting losses. Since each piece of property is insured to the full extent of the total coverage, the actual value of the piece at the time of the loss is the only limitation. In a scheduled policy, each specific piece of property in the amount covered is listed in the policy itself, which listing not only is referred to in making adjustments for losses, but provides the limit of recovery under the policy.

The School Board, in its invitation to bid for the insurance, provided a statement of values of its property, together with its "blanket form," which blanket form was required to and did become part of the policy when issued.

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[1] See *National Bank of Burlington v. Fidelity & Casualty Co. of N. Y.*, 4 Cir., F. (2d) 920, 924, and cases there cited. See also 6 Appleman, Insurance Law and Practice, § 3912, p. 297.

[2] See Note 1 and *Vance* on *Insurance* (1951), p. 63.

This blanket form specially provides coverage "on all property (of the Board) of every kind and description, both movable and immovable," without in any way listing such property. The policy itself, in the place provided for the schedule or listing of the property covered, merely gives the dollar amount of the total coverage at an average rate, and, for the description of the property covered, merely refers to the attached form, the School Board blanket form.

At the time of the loss in suit, the policy had been endorsed many times. These endorsements are issued whenever property was to be deleted from the coverage as when the property no longer belonged to the School Board, or when property was to be added to the coverage as when such property was acquired by the Board. These endorsements not only specified the value of the property added or deleted, but also changed the total amount of the coverage of the policy by reason of such addition or deletion.[3] No change, however, was made in the average premium rate, irrespective of the type of property added or deleted.

On March 27, 1958, the St. Landry School, owned by the Orleans Parish School Board, suffered a fire which resulted in almost total destruction of the school and its contents. The precise question presented by this litigation is the amount to which the School Board is entitled by reason of this loss. The School Boards position is that

[3] A typical endorsement reads as follows:

"In consideration of an additional premium of $8.79, the following locations and amounts totaling $9,500.00 are added to the schedule effective June 3, 1951, and the total insurance is increased in the amount of $8,550.00. This policy being for 30% of the total contributing insurance is increased in the amount of $2,565.00 and the policy now covers in total amount of $15,016,933.97.

830 North Tonti Street	$5,000.00
822-24 North Tonti Street	4,500.00"

it is entitled to the amount which will restore the damaged immovable property to its original condition, plus the actual cash value of the movable property at the time of the loss. The insurer contends that its liability for the loss is limited to the value of the St. Landry School and its contents as shown in the statement of values which accompanied the invitation to bid. Both parties rely on the Valued Policy Law[4] of Louisiana which limits the insurer's liability to the total amount for which the property is insured, the School Board maintaining that the total amount for which the property is insured is the total amount of insurance on all of its property, whereas the insurer maintains that the total amount of insurance refers to the value of the specific property involved in the loss as shown in the statement of values.

Both parties agree, or at least their witnesses agree, that the policy in suit, considered without its endorsements, is a blanket policy. This is so because it was issued on a blanket form, at an average rate, in a total amount, on all of the property of the Orleans Parish School Board. The statement of values which accompanied the invitation to bid was not attached to or made part of the policy. The only property description in the schedule[5] of the policy was a reference to the blanket form

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[4] La. R.S. 22:695. This statute provides in pertinent part as follows: "Under any fire insurance policy * * * on * * * inanimate property, immovable by nature or destination, situated within the state of Louisiana, the insurer shall pay to the insured, in case of total destruction * * * the total amount for which the property is insured, at the time of such total destruction, in the policy of such insurer.

"* * * the insurer shall pay to the insured, in case of partial damage * * * such amount, not exceeding the amount for which the property is insured, at the time of such partial damage, in the policy of such insurer, as will permit the insured to restore the damaged property to its original condition."

[5] The schedule of the policy is that part which itemizes the property covered and shows the amount of coverage as to each item. Here there was only one item: "* * * all property (of the Board) of every kind and description both movable and immovable." The total amount of coverage is shown alongside that item.

covering all School Board property. Under such a policy, the amount of coverage as to each piece of property was the total coverage of all of the property. The total coverage floated over all of the property, fully covering the fluctuating value of each piece.[6]

But the insurer argues that, because the endorsements specified the individual pieces of property and their values to be deleted from or added to the coverage, the policy was somehow converted into a scheduled policy. In other words, these endorsements, according to the insurer, in some way had the retroactive effect of reading into the policy all the individual pieces of property of the School Board at their stated values, which were neither listed therein nor made a part thereof.

These endorsements are at best equivocal. It is true they specify the property to be added or deleted and its value. But it is also true that these same endorsements show the effect on the total coverage of the additions or deletions, indicating, of course, that each piece of property owned by the Board continued to be covered up to the total amount of the coverage. Moreover, the endorsements were all issued at the same average rate as the policy. The agent of the insurer, who executed the policy in its behalf and who prepared the endorsements thereto, testified that he had issued a blanket policy, that he had no intention of converting it into a scheduled policy by endorsement, and that his only purpose in showing in the endorsements the specific property being added to or deleted from the coverage was to supplement the original statement of values which accompanied the invitation to bid.

Unquestionably, these endorsements are inartistically

[6] See Notes 1 and 2.

drawn. But, admittedly, they were drawn by the agent of the insurer as amendments to the insurer's policy. And it is hornbook law that ambiguities in the policy or its endorsements are to be construed most favorably to the insured. This is particularly so where the policy itself is free from ambiguity and ambiguous language in the endorsement is sought by the insurer to change the clear language of the policy.

The position of the insurer in this case is most difficult to understand. It objects to the admission of parol evidence to vary the terms of the policy, asserting that the language of the policy, including the amendments is clear and unambiguous. Yet it would have this court refer to the statement of values which accompanied the invitation to bid, but which was not made part of the policy, to determine the extent of its coverage of the loss in suit.[7] The simple fact is that this policy of insurance, unlike most policies, and unfortunately for the insurer, is crystal clear. It provides coverage in the total amount of the policy on each piece of property owned by the Orleans Parish School Board.

The blanket form attached to and made part of the policy has a co-insurance provision which requires the assured to maintain insurance "on each item of property insured in this policy of not less than ninety (90%) per cent of the actual cash value thereof" at the risk of becoming an insurer to the extent of the deficit. The insurer makes much of this language, arguing that "each item of property" clearly indicates that the parties intended a scheduled, rather than a blanket, policy, however, reference to the part of the policy where the property insured is itemized shows only one item simply

[7] Under Louisiana law it is doubtful that this statement of values is even admissible in evidence. See La. R.S. 22:618.

described: "As perform attached." And the form attached of course, provides for coverage on all property owned by the Board without delineation. Actually, it is this 90 per cent co-insurance clause which required the insurer to be advised or changes in the School Board property covered so that the insurer would be in a position to determine whether or not the clause was being complied with. Under this blanket policy the clause would be satisfied as long as the total amount of coverage was 90 per cent of the total value of all the property. In order to make this determination, it would be necessary for the insurer to have this information.

Consequently, unless the insurer here can prove that the total amount of coverage as shown on the policy is less than 90% per cent of the total value of all of the property of the Orleans Parish School Board, it will be required to pay the Board such amount as will permit the insured "to restore the damaged (immovable) property to its original condition," including architect's fees, in addition to an amount equal to the actual cash value[9] of the movable property lost in the fire.

New Orleans, Louisiana

UNITED STATES DISTRICT JUDGE

April 3, 1961

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[8] La. R.S. 22:695; *Tilley v. Camden Fire Ins. Ass'n.*, 139 La. 985, 72 So. 709; *Garnier v. Aetna Ins. Co. of Hartford Conn.*, 181 La. 426, 159 So. 705. See also *Vance on Ins.* p. 769.

[9] The Valued Policy Law of Louisiana does not apply to movables *Tedesco v. Columbia Ins. Co.*, 177 La. 142, 148 So. 8. Fire loss on movables is governed by statute. La. R.S. 22:691; *Lake Arthur Dredging Co. v. Mechanics Ins. Co.*, 162 La. 1090, 111 So. 466, 469.

APPENDIX 2

Opinion of Wright, District Judge, January 5, 1962

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 8742-B
CIVIL ACTION

RELIANCE INSURANCE COMPANY
Plaintiff

versus

ORLEANS PARISH SCHOOL BOARD
Defendant

Deutsch, Kerrigan & Stiles
Rene H. Himel, Jr.
Frank J. Peragine
Attorneys for Plaintiff

Samuel I. Rosenberg
Attorney for Defendant

WRIGHT, District Judge:

In a prior opinion in these proceedings,[1] this court held that the policy in suit provided blanket coverage and that each individual parcel of property owned by the Board is covered up to the total value of all the property. Consequently, any loss under the policy, short of total destruction of all the schools covered, would be a partial loss, irrespective of the fact that the particular school building subjected to the fire may be totally destroyed. This court further held that "unless the insurer here can prove that the total amount of coverage as shown on the

[1] *Reliance Insurance Co. v. Orleans Parish School Board*, E.D. La., 192 F. Supp. 524.

policy is less than 90 per cent of the total value of all of the property of the Orleans Parish School Board, it will be required to pay the Board such amount as will permit the insured 'to restore the damaged [immovable] property to its original condition,'[2] including architect's fees, in addition to an amount equal to the actual cash value of the movable property lost in the fire."[3] Since the insurer has stipulated that the face amount of the policy was 90 per cent of the aggregate value of the property insured at the time of the fire, and since the parties have agreed as to the actual cash value of the movable property lost in the fire,[4] there remains for determination only the cost of restoring the St. Landry School to its original condition at the time of the fire.

The parties have stipulated that the replacement cost of the entire building would have been $408,000, $385,000 construction costs plus $23,100 architect's fees at 6 per cent. This figure, plus $8,724 for demolishing the portion of the building left standing and removing the debris left by the fire, is the amount the Board claims as restoration costs. The parties have further stipulated that $336,600, $306,000 construction costs plus $30,600 architect's fees at 10 per cent, is the cost of replacing that portion of the building which was totally destroyed by fire and of repairing that portion of the building which was not destroyed by fire. This figure, less depreciation and obsolescence stipulated to be 21 per cent of the replacement cost, is the amount suggested by the insurer.

The test in determining restoration costs, insofar as they relate to the use or non-use of part of a building left standing after a fire, is what a reasonably prudent uninsured owner would do under the circumstances.[5]

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[2] La. R.S. 22:695B.
[3] *Reliance Insurance Co. v. Orleans Parish School Board*, *supra*, 527.
[4] The value is stipulated to be $83,667.00.
[5] See Vance, *Handbook of the Law of Insurance*, at page 771.

While the Louisiana cases do not in terms use this language in making this determination, an analysis of these cases shows that this is, in effect, the test which the Louisiana courts apply.[6] Applying this test here, this court finds that the part of the St. Landry School remaining standing after the fire was not usable in effecting its restoration.

The evidence shows that of the 25 per cent of the building left standing, only the studs and frames were usable in restoration. And in using these standing parts, there would be no guarantee of the structural integrity of the restored building. The assured is not required to assume this risk.[7] Moreover, the evidence is uncontroverted that the building, in any event, could not be restored to its condition before the fire because of current municipal building code requirements. As an existing building before the fire, it complied. Since its damage from the fire amounts to 75 per cent of the entire structure, restoration must conform to the current code requirements.[8] These requirements make the remaining 25 per cent unusable. The assured should not be penalized by the change in code requirements. The Board kept its insurance current. No reason appears why that current insurance did not protect against code changes.[9]

With reference to depreciation, again the position of the insurer is without merit. The insurer insists on referring to the provisions of the Standard Fire Policy

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[6] See *Hart v. North British & Mercantile Ins. Co.*, 182 La. 551, 162 So. 177; *Occhipinti v. Boston Ins. Co.*, La. App., 72 So. 2d 326; *Mix v. Royal Exchange Assur. Co.*, La. App., 54 So. 2d 355; *Briede v. Commercial Union Assurance Co.*, 14 Orl. App. 120. *Compare Lake Arthur Dredging Co. v. Mechanics' Ins. Co.*, 162 La. 1090, 111 So. 466; *Monteleone v. Royal Ins. Co.*, 47 La. Ann. 1563, 18 So. 472.

[7] See *Occhipinti v. Boston Ins. Co., supra*, 332.

[8] 16 Orleans Building Code, Art. 1607.

[9] See *Hart v. North British & Mercantile Ins. Co., supra*; *New Orleans Real Estate M. & S. Co. v. Teutonia Ins. Co.*, 128 La. 45, 54 So. 466; *Briede v. Commercial Union Assurance Co., supra*, 123.

Act[10] in support of its contentions. As to depreciation, it particularly points to the language of that Act, which language is repeated in the policy here in suit, which limits recovery to "actual cash value" of the property lost in the fire. Then the insurer cites the long line of cases which interprets "actual cash value" as replacement cost less depreciation.

What the insurer ignores in making this argument is the settled jurisprudence of this state to the effect that the Valued Policy Law,[11] not the Standard Fire Policy, governs fire loss on immovables.[12] And this is so even though, as required, the policy here faithfully tracks the Standard Fire Policy form. There is no reason for this court, if it could, to explain the obvious anomaly. This is for the Louisiana courts. All this court must do is read the Louisiana jurisprudence as it finds it, irrespective of its confused state.

So doing, no Louisiana case is found which allows depreciation on replacement cost of an immovable fire loss.[13] The one case[14] cited by the insurer which seems

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[10] La. R.S. 22:691.

[11] La. R.S. 22:695.

[12] On two different occasions the Louisiana Supreme Court has held that the Standard Fire Policy applies solely to movables and the Valued Policy Law applies to immovables: *Hart v. North British & Mercantile Co., supra; Lake Arthur Dredging Co. v. Mechanics' Ins. Co., supra.* Since those decisions the Louisiana legislature has re-enacted or amended the Standard Fire Policy Act and the Valued Policy Law no less than four times without reference to, and without changnig, the judicial interpretation placed on these statutes. Act 251 of 1944; Act 540 of 1950; Act 295 of 1552; Act 125 of 1958. The Louisiana courts have apparently read these statutes correctly. See *Hart v. North British & Mercantile Ins. Co., supra*, 181.

[13] There are many which apparently deny depreciation. *Aycock v. Republic Insurance Company*, La. App., 116 So. 2d 317; *Ware v. American Druggists' Fire Ins. Co.*, La. App., 38 So. 2d 531. See also *Tilley v. Camden Fire Ins. Ass'n*, 139 La. 985, 72 So. 709, 711. Compare *Brocato v. Sun Underwriters Ins. Co. of New York*, 219 La. 495, 53 So. 2d 236.

[14] *Stenzel v. Pennsylvania Fire Ins. Co.*, 110 La. 1019, 35 So. 271. This case was decided in 1903. The Valued Policy Law first became effective in 1900 via Act 135 of that year. Incidentally, despite the suggestion

Continued

to so hold was apparently based on a loss occurring before the Valued Policy Law became effective. The other cases cited by the insurer are either from other jurisdictions or relate to fire loss on movable property. The conclusion must be that restoration cost, without depreciation, is the measure of recovery for fire loss on an immovable in Louisiana.

The Board, alleging the insurer's failure to pay the loss on the policy, also makes a claim for attorney's fees and statutory penalty under La. R.S. 22:658. The statute provides for attorney's fees and penalty where the insurer's failure to pay is "arbitrary, capricious, or without probable cause." It is true that the Louisiana courts have, at times, interpreted this language loosely.[15] But not loosely enough to lasso the insurer here. The insurer deposited in the registry of the court a substantial sum covering what it concedes to be its indebtedness under the policy. While this alone may not prove good faith, it is a step in the right direction. Moreover, while many of the insurer's arguments appear improvised, indicating a reluctance to pay fully what is owed under the policy, this court cannot with assurance say that the insurer's conduct is "arbitrary, capricious, or without probable cause" within the intendment of this penal statute.[16]

Judgment should be entered in favor of defendant for $115,002.50,[17] with interest from the date of judicial

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[14] (Continued)
in the court's syllabus of this case that depreciation was a consideration in determining the amount payable under the policy, the court granted judgment in the full amount thereof. Moreover, the court's authority for its ruling, quoted at p. 273, begins "Except as otherwise provided by valued policy laws, * * * "

[15] See e.g., *Thomas W. Hooley & Sons v. Zurich Gen. Acc. & L. Ins. Co.*, 235 La. 289, 103 So. 2d 449.

[16] See *Finley v. Hardware Mutual Insurance Company*, 237 La. 214, 110 So. 2d 583, 587.

[17] Plaintiff was the 50 per cent insurer of the Board's property. Thus the board is entitled to one-half of replacement cost plus cost of debris removal plus movable loss, less the amount already paid.

demand,[18] plus costs.

(Signed) J. SKELLY WRIGHT
UNITED STATES DISTRICT
JUDGE

New Orleans, Louisiana
January 5, 1962

[18] *Gettwerth v. Teutonia Ins. Co.*, 29 La. Ann. 30. See also *Stovall v. Empire State Ins. Co.*, 215 La. 100, 39 So. 2d 837.

APPENDIX 3

Opinion of Court of Appeals, Fifth Circuit

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19580

RELIANCE INSURANCE COMPANY,
Appellant-Appellee,

versus

ORLEANS PARISH SCHOOL BOARD,
Appellee-Appellant,
(AND REVERSE TITLE).

Appeals from the United States District Court for the Eastern District of Louisiana.

(September 19, 1963.)

Before TUTTLE, Chief Judge, WISDOM, and GEWIN, Circuit Judges.

WISDOM, Circuit Judge:

In this action for a declaratory judgment the Court is asked to construe a fire insurance policy covering the public school properties in Orleans Parish, Louisiana. The principal question for decision is whether the policy is a scheduled policy, as the insurance company contends, or a blanket policy as the district court held. We agree with the district court on this major point.

In March 1954 the Orleans Parish School Board issued invitations for bids on fire and explosion insurance on its schools and their contents. The bid specifications

included a form described in its heading as, "Location of Schools and *Statement of Values*". Reliance consistently refers to this form in its briefs as the "Schedule of Values" or the "Schedule". The bid specifications also included a form identified in its heading as, "School Form-Blanket". This form relates to coverage and other conditions. The aggregate face of the policies, when issued was $49,883,196.57, representing 90% of the aggregate valuation (then $55,425,773.96) of the insured properties according to the values listed in the "Statement of Values". The insurance was placed with the Reliance Insurance Company and three other companies. Reliance carried fifty per cent of the total insurance.

March 27, 1958, Landry School in New Orleans was almost totally destroyed by fire. On the date of the fire, the face value of Reliance's policy was $28,880,209.29. The school and its contents were valued at $337,192 in the statement of values. Reliance deposited $135,193 in the registry of the court, contending that this was the maximum amount it owed under its policy, and sought a judicial declaration that its liability was limited to the value of Landry School as shown in the statement of values. The Board withdrew the deposited sum of $135,193 and filed a counter-claim for $115,052.50 plus penalties, interest, and attorney's fees.

The Board contends that Reliance issued a blanket policy and was therefore liable for the full amount necessary to restore the damaged building to its original condition, together with the actual cash value of the movable (personal) property destroyed. Reliance contends that the only indication the policy may have been intended to be a blanket policy, is the word "Blanket" in the heading "School Form-Blanket"; that, considering the policy as a whole, the "Schedule of Values" (that is, the state-

ment of values) was incorporated by reference in the endorsements and was treated at all times as part of the policy. The district court held in favor of the School Board and, in a later phase of the iltigation, refused to reduce the judgment by allowing for the building's depreciation at the time of the fire. Reliance appeals.

I.

Both parties agree that this acion is governed by Louisiana's Valued Policy Law. Section 695 provides, in relevant part:

> "Under any fire insurance policy * * * on any inanimate property, immovable by nature of destination, situated within the state of Louisiana, the insurer shall pay to the insured, in case of partial damage, * * * such amount, not exceeding the amount for which the property is insured, at the time of such partial damage, in the policy of such insurer, as will permit the insured to restore the damaged property to its original condition." LSA-R.S. 22:695B.

The parties disagree as to whether the court may refer to the "Location of Schools and Statement of Values" in construing the contract. The Board takes the position that it is not part of the policy and is even inadmissible in evidence. Appleman states the general rule:

> "The standard form fire policy evidences an intent to put the entire insurance contract into one instrument in the hands of the insured. Statements and agreements, to be effective as part of the policy, must usually be physically endorsed thereon or attached thereto, and while documents unattached to policies may be examined to ascertain the insurer's obligation, they may not control such obligation, or otherwise affect the insured's rights." Appleman, *Insurance Law and Practice*, § 7527, p. 261 (1962).

Article 1949 of the Louisiana Civil Code limits reference to "other contracts or agreements made on the same subject *between the same parties*". Here, the valuation sheet was annexed to, and made a part of the invitation for bids resulting in a contract between the Board and Hardin and Ferguson, Inc., agents for both the Board and Reliance.

The authorities the Board cite only skirt this case. Here the parties incorporated the valuation sheet by reference in the first endorsement, which was a part of the policy when it was issued. The reference is repeated in almost all of the forty later endorsements.[1] Nothing in the Louisiana Insurance Code or in the Civil Code would prevent reference to the list. See *Walker v. Gravier*, La. App. 1961, 131 So. 2d 553; *Dalgarn v. New Orleans Land Co.*, 1927, 162 La. 891; 111 So. 271; *Bush Wine and Liquor Co. v. Wolff*, 1896, 48 La. Ann. 918, 19 So. 765; *Heirs of Delogny v. Mercer*, 1891, 43 La. Ann. 204, 8 So. 625; *Labiche v. Jahan*, 1844, 9 Rob. 30; *Suarez v. Duralde*, 1830, 1 La. 260. See also 3 Williston on Contracts (rev. ed.), Section 628; *Bell v. The Western Marine & Fire Ins. Co.*, 1843, 5 Rob. 423, 442; *Paddleford v. Fidelity & Casualty Co.*, 7 Cir. 1939, 100 F. 2d 606; *cert. den'd* , 306 U.S. 664; *Corley v. Travelers' Protective Ass'n*, 6 Cir. 1900, 105 Fed. 854.

The Insurance Code does not define the term, "blanket policy". Appleman describes it as follows:

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[1] The district court cited the following endorsement as "typical":

"In consideration of an additional premium of $8.79, the following lecations and amounts totaling $9,500.00 are added to the schedule effective June 3, 1954, and the total insurance is increased in the amount of $8,550.00. This policy being for 30% of the total contributing insurance is increased in the amount of $2,565.00 and the policy now covers in total amount of $15,016,933.97.

820 North Tonti Street	$5,000.00
822-24 North Tonti Street	$4,500.00"

> "A blanket, compound, or floater policy is written upon a risk as a whole, embracing whatever article or items are included therein, often changing in its nature; in contravention thereto, a specific policy is one which allocates the amount of the risk in stated values upon the several items embraced in the coverage." 6 Appleman, Insurance Law and Practice, Sec. 3912, p. 297.

One well-known definition is:

> "[Blanket insurance] is one that invariably covers and attaches to every item of property described therein. If the loss of one item exhausts the whole amount of the policy, the entire insurance must be paid, and there can be no apportionment. Another definition is that a compound, or blanket, policy is one which insures property collectively without providing in the event of a loss for a distribution of the insurance to each item." *Wilson and Co. v. Hartford Fire Ins. Co.*, 1923, 254 S.W. 266.

"Blanket policy" is "a term of art". *National Bank of Burlington v. F. & C. Co. of New York*, 4 Cir. 1942, 125 F. 2d 920, 924. "Terms of art or technical phrases are to be interpreted according to their received meaning with those who profess the art or profession to which they belong." Civ. Code Art. 1947. Accordingly, both parties called witnesses to explain the meaning of "blanket" or "scheduled" in relation to insurance policies.

The experts all agreed on the basic differences between a blanket policy and a scheduled or specific policy. All agreed that the first six pages of the policy indicate that the policy here is a blanket policy. Reliance's expert testified that, taking the policy as a whole, with the endosements, it is a scheduled policy. The Board's experts conceded that the endorsements incorporating the sched-

ule are inconsistent with a blanket policy, but, as we read their testimony, they found many reasons for not characterizing the policy as a scheduled policy. The witnesses were in general agreement that the statement of values, here the "Location of Schools—Statement of Values", issued by an assured in connection with a blanket policy has no relation to a scheduled policy. The schedule used in a scheduled policy lists each piece of property with the amount of insurance applicable to each. The statement of values used in connection with a blanket policy is not a part of the policy but is furnished by an assured to the Louisiana Fire Prevention and Rating Bureau and is used by the Bureau for the purpose of arriving at an average rate for a blanket policy. The Bureau's printed form used for the Statement of Values in connection with blanket policies is identical with the document entitled "Location of Schools and Statement of Values", which was annexed to the School Board's specifications for bids. An average rate usually indicates a blanket policy. In adjusting prior losses under this policy, the parties did not refer to the statement of values. The Secretary for Hardin and Ferguson, Inc., (agents for the Board and for Reliance) whom the Board called as a witness, testified that he had handled the mechanics of issuing and servicing the policy. He described the policy in suit as a blanket policy, and testified that the parties intended to insure by blanket-insurance.

Reliance argues that, as the experts testified, a blanket policy usually covers an item, or class of property, such as inventory or a stock of goods, which fluctuates in content. This policy, however, covered specifically enumerated items of property, each of which had been assigned a specific value on the valuation sheet. Second, the policy was endorsed over forty times, and these endorsements either deleted or added property and specified

the value of the property. If this policy had in fact been a blanket policy, Reliance argues, the School Board could merely have asked an increase or decrease in its insurance by a stated round figure, without bothering to detail the value of the property added or deleted. Finally, Reliance points to the policy's co-insurance clause, which requires the School Board to "maintain insurance on each item of property insured by this policy of not less than ninety per cent of the actual cash value thereof." Each item of property refers, it insists, to each piece listed in the valuation sheet and the later endorsements to the policy; each item listed was therefore insured for 90 per cent of the amount assigned to it in the schedule, and not for $57,800,000, the face amount of the policy.

Counsel for appellant argues ably and forcibly, but we find countervailing considerations which persuade us that the parties intended what the special form plainly stated—"School Form—Blanket" policy. Over 350 pieces of property were listed on the valuation sheet submitted with the bid specifications and in three years over forty changes in the property covered were made by means of endorsements to the policy. This is surely some indication that the risk covered by the policy did comprise one item, i.e., the global aggregate of the insured property owned by the School Board of Orleans Parish.[2] This was subject to relatively frequent changes in content, and was thus of a type suitable for coverage by a blanket policy. Moreover, the fact of a specific listing of separate pieces of property and their value was not at all inconsistent with the blanket policy as written. This was essential, initially, in order for the bidders to compute the average insurance premium. Later, the statement of values and

[2] Here there was only one item: "* * * all property [of the Board] of every kind and description, both movable and immovable." The total amount of coverage is shown alongside that item.

separate endorsements, which listed the specific value of the property added or deleted, continued to be necessary for the purpose of determining the insured's compliance with the ninety per cent co-insurance clause.

Indeed, if the policy had been a specific or scheduled one, the School Board would have been charged a premium determined by the risk involved in insuring each additional piece of property on the endorsements, rather than the average rate which, in fact, was charged in each instance. A similar point can be made with reference to the statement of values. The amounts in the statement set opposite each separate property are not the amounts of insurance coverage afforded by the fifty per cent policy, but the full value of each building. This is more in accord with the nature of a blanket than a scheduled policy.

The wording of the co-insurance clause does not compel a different conclusion. It does, it is true, refer to "each item of property insured by this policy," but the part of the policy describing the property insured shows only one item described: "As per form attached." The clause required insurance coverage of 90 per cent of the total value of all the property, and in order for the insurance company to determine whether this clause had been complied with, it was necessary that it have the information as to value of the property contained in the schedule and the endorsements.

We hold that the district court did not err in its construction of the policy as a blanket policy.

II.

The second point Reliance raises is that the district court erred in holding that no deduction should be made

from replacement cost on account of accrued depreciation of the Landry School building. It urges that this ruling is not warranted by the Louisiana Valued Policy law or the Louisiana cases.

The rule in Louisiana, as to both movable (personal) and immovable (real) property, is that liability under a fire policy can in no event exceed the amount for which the property is insured. *Lake Arthur Dredging Co. v. Mechanics' Ins. Co.*, 1927, 162 La. 1090, 111 So. 466; *Young v. Fireman's Fund Ins. Co.*, 1926, 160 La. 275, 107 So. 108; *Brough v. Presidential Fire & Marine Ins. Co.*, Orl. App. 1937, 176 So. 895, 905, annulled on other grounds, 1938, 189 La. 880, 181 So. 432; *Chambers v. North British & Merchantile Ins. Co.*, La. App. 1-1937, 175 So. 95; *Hinson v. British American Assur. Co.*, W.D. La. 1942, 43 FS 951.

The Louisiana Valued Policy statute stipulates that "in case of partial damage," the insurer shall pay "such amount * * * as will permit the insured to restore the damaged property to its original condition." LSA-R.S. 22:695B. At least one commentator has construed this provision to authorize "payment to the insured of a sum sufficient to permit him to restore the damaged property to its original condition at the time of loss, thus codifying the replacement-cost-less-depreciation test." Note, *Valuation and Measure of Recovery Under Fire Insurance Policies*, 49 Columbia L. Rev. 818, 828 (1949). The Louisiana Supreme Court, in dictum, has reached the same conclusion. In *Lake Arthur Dredging Co. v. Mechanics' Ins. Co.*, 1927, 162 La. 1090, 111 So. 466, 469, the state court, although holding that the statute was inapplicable to a dredge, stated,

> "so that if the present policy could be brought within the terms of the valued policy statute as

> above referred to, there being only a partial damage, the only alternative left to the defendant would be to pay the insured the full par value of the policy, for, as shown by the admission and proof of loss, it would take more than that amount to restore the property to its original condition *at the time of the fire.*" (Emphasis supplied.)

In an earlier case, *Stenzel v. Pennsylvania Fire Ins. Co.*, 1903, 110 La. 1019, 35 So. 271, where the loss occurred before Louisiana enacted its Valued Policy Law, the Supreme Court held that "in determining the value of the insured property, in adjusting the loss under a fire insurance policy * * * the aim must be to arrive as near as possible at the value of the insured property as it stood on the day of the fire, taking into consideration what would be the cost of rebuilding, and allowing for the difference in value between the buildings new and in the condition in which they were destroyed." (Syllabus by the Court.) The Court allowed an estimated "deterioration" of ten per cent.

The replacement-cost-less-depreciation standard is the rule applied by most courts in determining the insurance owed in cases of partial loss.

> "The majority rule provides that the insured is to recover the cost of restoring the damaged structures to their condition immediately before the fire. The actual computation is made by considering the present value of the damaged portion and the extent of destruction, and subtracting therefrom an appropriate amount for depreciation." Note, *Valuation and Measure of Recovery Under Fire Insurance Policies*, 49 Columbia L. Rev. 818, 825-26 (1949)

This would, indeed, seem to be the common-sense rule. Insurance which covers the full cost of repair or replace-

ment, without deduction for assured depreciation is available at a higher premium. If the insured property is in a decayed condition at the time of a fire which necessitates substantial rebuilding, the insurer should not be forced to pay for erecting what is in effect a new building, or even for appreciably extending the normal life of the old building. If, on the other hand, the portion damaged has little or no structural significance, there would be no compelling reason for considering depreciation. Note, *Valuation and Measure of Recovery Under Fire Insurance Policies*, 49 Columbia L. Rev. 818, 826 (1949).

Several of the Louisiana cases cited by the School Board are justified under this latter rationale. Thus, in *Ware v. American Druggists' Fire Insurance Co.*, La. App. 1949, 38 So. 2d 531, the cost of restoration was only $243.00, which was for fresh paint, reconditioning a water heater, carpenter work and materials. Except for some weather boarding which had been removed, the only damage was to a hot water heater and the building's paint, which had been discolored by smoke. In such a case, depreciation might well not be an appropriate item for consideration. In *Brocato v. Sun Underwriters Ins. Co.*, 1951, 219 La. 495, 53 So. 2d 246, a case involving hurricane damage, the court did indeed refuse to allow a reduction in recovery to take account of the building's run-down condition, but that case involved a windstorm policy, not governed by the Louisiana Valued Policy law. Moreover, the court pointed out that the building "was no doubt in the same condition when the policy was issued just six months before the storm." 53 So. 2d at 250. The other cases cited by appellee in support of the lower court's holding, such as *Aycock v. Republic Ins. Co.*, La. App. 1959, 116 So. 2d 317, give no indication that the question of depreciation was raised.

The Valued Policy Law of Louisiana does not apply to movable (personal) property. The provisions of the standard (statutory) Louisiana fire policy, therefore, determine the extent of liability for loss of the contents of the Landry School building. R.S. 22:691. The standard, statutory, form of fire policy for Louisiana provides insurance "to an amount not exceeding * * * dollars", to the extent of the "actual cash value of the property at the time of loss." R.S. 22:691.

Although the Louisiana law on this issue is not settled, what law there is seems to indicate that in case of a partial loss depreciation must be considered in determining an insurer's liability on a fire insurance policy.

III.

The School Board has filed a cross-appeal, urging that the district court erred in refusing to award interest from December 30, 1958, which was sixty days after the proofs of loss were filed. Relying upon *Gettwerth v. Teutonia Ins. Co.*, 1877, 29 La. Ann. 30 and *Stovall v. Empire State Ins. Co.*, 1949, 215 La. 100, 39 So. 2d 837, the district court held that interest should run only from the date of judicial demand, March 3, 1959. This ruling is supported by the decisions cited.

Although the court in *Stovall* merely stated that the lower court had rendered judgment with legal interest from the date of judicial demand and did not discuss the point, there was no indication that this was not the usual rule. In *Gettwerth*, however, the Louisiana Supreme Court expressly held that the interest should have been allowed only from the date of judicial demand; and not from sixty days after proof of loss. Appellee cites *Isadore v. Washington Fire & Marine Ins. Co.*, La. App. 1954, 75 So. 2d 247, in support of its contention. There a Lou-

isiana court of appeals held that interest should run from sixty days after proof of loss rather than from the date of loss. It is not shown, however, that the insurance company in that case raised before the court the third possibility with which we are here concerned; that interest should run from the date of judicial demand. *Gettwerth* is, therefore, the only Louisiana case which considers the issue directly. The trial judge did not err in following it.

IV.

Finally; the School Board urges that the trial judge should have held that Reliance is liable for the statutory penalty plus attorney's fees. LSA-R.S. 22:658 provides in part:

> "Failure to make such payment within sixty days after receipt of such proofs and demand therefore, when such failure is found to be arbitrary, capricious, or without probable cause, shall subject the insurer to a penalty, in addition to the amount of the loss, of 12% damages on the total amount of the loss, payable to the insured * * * together with all reasonable attorney's fees. * * * Provided, that all losses on policies covering automobiles, trucks, motor propelled vehicles and other property against fire and theft, the amount of the penalty in each of the above cases shall be 25% and all reasonable attorney's fees."

Whether the insurance company's refusal to pay was so lacking in foundation or cause as to fall within the terms of the statutory penalty is primarily a question of fact. Here the trial judge found that the company had evidenced good faith by depositing a substantial sum in the court's registry, *cf., New v. Union Automobile Ins. Co.*, La. App. 1932, 141 So. 416, and that he could not "with assurance say that the insurer's conduct is 'arbitrary, capricious or without probable cause' within the

intendment of this penal statute." We would make the same educated guess that this is the standard Louisiana courts would apply in such a case as this. See *Finley v. Hardware Mutual Ins. Co.*, 1959, 237 La. 214, 110 So. 2d 583; *Aycock v. Republic Ins. Co.*, 1959, 116 So. 2d 317. The lower court's finding is supported by sufficient evidence and will not be overruled on appeal.

Summarizing, we affirm the district court's holding that the policy in suit was a blanket policy; we reverse the holding that depreciation need not be considered in determining the appellant's liability on the policy; we affirm the holdings that interest runs from the date of judicial demand and that Reliance's refusal to pay was not so lacking in cause as to justify imposition of statutory penalties.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
By s Clara R. James
Deputy

New Orleans, Louisiana
Dec 19 1963

[SEAL]

APPENDIX 4

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 19580

D. C. Docket No. 8742 Civil

RELIANCE INSURANCE COMPANY,
Appellant-Appellee,

versus

ORLEANS PARISH SCHOOL BOARD,
Appellee-Appellant,

AND REVERSE TITLE

Appeal from the United States District Court for the Eastern District of Louisiana

Before TUTTLE, Chief Judge, WISDOM and GEWIN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Cour tthat the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellant-

appellee, Reliance Insurance Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 19, 1963

Issued as Mandate:

APPENDIX 5

U. S. Court of Appeals
Filed Dec 12 1963
Edward W. Wadsworth, Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 19580

RELIANCE INSURANCE COMPANY,
Appellant-Appellee,

v.

ORLEANS PARISH SCHOOL BOARD,
Appellee-Appellant,

(AND REVERSE TITLE)

Appeals from the United States District Court for the Eastern District of Louisiana.

(December 12, 1963)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, WISDOM, and GEWIN, Circuit Judges.

PER CURIAM:

It is ORDERED that the petition for rehearing in the above entitled and numbered cause is hereby DENIED.

APPENDIX 6

L.S.A.-R.S. 22:695

"A. Under any fire insurance policy, which may be written hereafter, and which is intended to take effect, at or after 12 o'clock noon, Central Standard Time, on the first day of August, 1952, on any inanimate property, immovable by nature or destination, situated within the state of Louisiana, the insurer shall pay to the insured, in case of total destruction, without criminal fault on the part of the insured or the insured's assigns the total amount for which the property is insured, at the time of such total destruction, in the policy of such insurer.

B. Under any fire insurance policy, which may be written hereafter, and which is intended to take effect, at or after 12 o'clock noon, Central Standard Time, on the first day of August, 1952, on any inanimate property, immovable by nature or by destination, situated within the state of Louisiana, the insurer shall pay to the insured, in case of partial damage, without criminal fault on the part of the insured or the insured's assigns, such amount, not exceeding the amount for which the property is insured, at the time of such partial damage, in the policy of such insurer, as will permit the insured to restore the damaged property to its original condition.

C. Nothing herein shall be so construed to prevent the insurer, under any such fire insurance policy, at such insurer's own expense and without contribution on the part of the insured, from replacing property, immovable by nature or destination, partially damaged or totally destroyed.

D. Any clause, condition or provision, which may be included in any policy of fire insurance, writ-

ten to take effect at or after 12 o'clock noon, Central Standard Time, on the first day of August, 1952, contrary to the provisions of this Section, shall be null and void; but nothing herein shall be construed to prevent any insurer from cancelling or reducing the insurance on any property, immovable by nature or destination, previous to damage to or destruction thereof."